

OPINION

The defendant was convicted by jury verdict of first degree murder and attempted first degree murder. Defendant was seventeen (17) years of age at the time the offenses were committed. He was sentenced to life imprisonment for first degree murder and twenty (20) years for second degree murder to run consecutively. In this direct appeal he raises the following issues:

1. whether the trial court erred in accepting the transfer of this case from juvenile court;
2. whether the evidence was sufficient to support the convictions of first degree murder and attempted first degree murder; and
3. whether the trial court erred in the sentencing of defendant.

We find all issues to be without merit and affirm the convictions and sentences.

JUVENILE TRANSFER HEARING

At the time of commission of these offenses the defendant was seventeen (17) years of age. Our law provides that juveniles sixteen (16) years of age or more at the time of the alleged offense are subject to transfer to adult court provided there are reasonable grounds to believe that:

- _____ (1) the child committed the delinquent act as alleged;
- (2) the child is not committable to an institution for the mentally retarded or mentally ill; and
- (3) the interests of the community require that the child be put under legal restraint or discipline.

T.C.A. § 37-1-134(a)(4); State v. Williams, 784 S.W.2d 660 (Tenn. Crim. App. 1989).

Both the juvenile judge at the transfer hearing and the criminal court judge found these criteria had been met. The evidence does not preponderate against these findings. This issue is without merit.

FACTS

On April 28, 1993, the defendant along with Eric Graham and Shane Orlando had been drinking and riding around in Graham's vehicle. An argument ensued precipitating defendant's pulling a knife on Orlando while in the vehicle. Orlando was able to take the knife from defendant, close the blade and keep it from defendant.

When Graham pulled up in defendant's driveway to let him out, the defendant requested his knife back. Orlando returned the knife, and defendant immediately stabbed Orlando in the stomach causing a severe wound.

Graham followed defendant into his home and requested the assistance of defendant's step-brother in calming defendant. Defendant kicked in a padlocked door to his mother's bedroom, picked out a 12 gauge shotgun along with some shotgun shells, loaded the gun with at least three (3) shells, exited the home and followed Graham to the vehicle.

Defendant's step-brother attempted to restrain him as he approached the truck occupied by Graham and Orlando. Neither Graham nor Orlando was armed. Nonetheless, defendant pointed the shotgun through the window directly at Graham's head and fired. The shotgun blast struck Graham's head at close range. Defendant fired a second shot striking Graham in the shoulder. Defendant then fired the third shot at Orlando missing him. Upon Orlando's begging and pleading with defendant to allow Orlando to get medical help for Graham, defendant allowed Orlando to drive away with Graham.

Defendant re-entered his home and called 911 for assistance. He coherently made a request for assistance. He advised neighbors that he had just "killed a boy that was in the yard." He did not seem upset but seemed as if he was bragging. According to the officers, defendant did not smell of alcohol and did not appear intoxicated.

Orlando lost consciousness while trying to drive Graham for medical attention. Graham died as a result of the gunshot wound to the head. Orlando was hospitalized for nine (9) days as a result of the severe stab wound.

SUFFICIENCY OF THE EVIDENCE

When an accused challenges the sufficiency of the convicting evidence, our standard of review is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or re-evaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). On appeal, the state is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Id. at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Defendant contends the evidence was insufficient to establish premeditation and deliberation. See State v. Brown, 836 S.W.2d 530 (Tenn. 1992). Although more than a split-second intention to kill is required to constitute premeditation, no specific period of time is required. Id. at 543. Similarly, deliberation requires proof that the homicide was committed with cool purpose and without passion or provocation which would reduce the offense to either second degree murder or manslaughter. Id. at 543.

We conclude that the evidence was sufficient to enable the trier of fact to have found the essential elements of first degree murder and attempted first degree murder.

The defendant had pulled a knife on Orlando earlier in the vehicle. It had been taken away from the defendant and given back to him by Orlando. Defendant, without cause, stabbed Orlando who was unarmed. Defendant then entered his residence with the intention of securing a shotgun. He kicked in a padlocked door, picked out a shotgun and shells, and loaded the firearm. He returned to the vehicle and shot Graham not once but twice at close range. He then shot at Orlando missing him. We conclude the elements of attempted first degree murder and first degree murder, including the elements of premeditation and deliberation, were adequately established by the proof. See State v. Gentry, 881 S.W.2d 1 (Tenn. Crim. App. 1993); State v. Ray, 880 S.W.2d 700 (Tenn. Crim. App. 1993).

Defendant further contends he was too intoxicated to be able to premeditate, deliberate and form the intent required to commit these offenses. Generally, the defense of intoxication negating specific intent is a question for the jury to determine. State v. Givens, 631 S.W.2d 720, 721 (Tenn. Crim. App. 1982). There must be evidence that intoxication deprived the accused of the mental capacity to form the requisite specific intent. State v. Bowers, 744 S.W.2d 588 (Tenn. Crim. App. 1987). Viewing the evidence in a light most favorable to the state, the jury was certainly justified in rejecting this defense.

LENGTH OF SENTENCES

Defendant was sentenced to life imprisonment for first degree murder and twenty (20) years as a Standard Offender for attempted first degree murder. The trial judge had no discretion as to the first degree murder conviction as life imprisonment was the only possible punishment due to the defendant's age. The range of punishment for attempted first degree murder as a Standard Offender is a minimum of fifteen (15) years and a maximum of twenty-five (25) years. The trial judge sentenced the defendant in the middle of the range.

Our review of the sentence imposed by the trial court is de novo with a presumption that the determinations of the trial court are correct. T.C.A § 40-35-401(d). The presumption of correctness which attaches to the trial court's action is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we consider the evidence presented at the sentencing hearing, the presentence report, the sentencing principles, arguments of counsel, statements of the defendant, the nature and characteristics of the offense, mitigating and enhancement factors, and the defendant's amenability to rehabilitation. T.C.A. § 40-35-210(b).

The trial court found that the victim's personal injuries from the stab wound were particularly great. T.C.A. § 40-35-114(6). The victim spent nine (9) days in the hospital and has suffered psychologically as a result of the defendant's actions. This enhancement factor is supported by the evidence.

The trial judge found that the defendant employed a deadly weapon during the commission of the offense. T.C.A. § 40-35-114(9). A knife is clearly a deadly weapon. The use of a deadly weapon is not an essential element of attempted first degree murder and was properly considered as an enhancement factor.

The trial judge found the defendant had no hesitation about committing a crime when the risk to human life was high and further found the crime was committed under circumstances under which the potential for bodily injury to a victim was great. T.C.A. § 40-35-114(10) and (16). The risk to human life and the great potential for bodily injury always exist with an attempted first degree murder. State v. Nix, 922 S.W.2d 894 (Tenn. Crim. App. 1995). Accordingly, these two (2) enhancement factors should not have been considered.

The court relied upon the following mitigating factors; to-wit:

(1) substantial grounds existed tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(2) the defendant, because of his youth, lacked substantial judgment in committing the offense; and

(3) the defendant was suffering from a mental condition that significantly reduced his culpability.

T.C.A. § 40-35-113(3),(6) and (8).

Even though the trial judge found these as mitigating factors, he did not place great weight upon them. However, the weight to be given enhancement and mitigating factors is left to the trial court's discretion. State v. Moss, 727 S.W.2d 229 (Tenn. 1986); State v. Santiago, 914 S.W.2d 116 (Tenn. Crim. App. 1995).

Even though the trial court utilized two (2) improper enhancement factors, we find the mid-range sentence of twenty (20) years to be appropriate. Accordingly, the length of sentence will not be disturbed.

CONSECUTIVE SENTENCING

In determining that the 20-year attempted first degree murder sentence should run consecutively to the life sentence, the trial judge found that the defendant was a "dangerous offender." T.C.A. § 40-35-115(b)(4). He noted the defendant had little regard for human life and no hesitation to commit these crimes where the risk to life was high. He further found aggravating circumstances surrounding the offense, the need to protect society by a lengthy sentence, and that the aggregate length of the sentence reasonably related to the offense.

T.C.A. § 40-35-115(b)(4) authorizes the court to impose consecutive sentences when the defendant is "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." However, every offender convicted of two (2) dangerous crimes is not necessarily a dangerous offender under the statute. State v. Wilkerson, 905 S.W.2d

933 (Tenn. 1995). The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender. Id. at 938.

The trial judge specifically found that all of the above requirements for consecutive sentencing were met. Those findings are clearly supported by the evidence. Consecutive sentencing was appropriate.

CONCLUSION

In summary, we find no error committed by the trial court. The convictions and sentences are affirmed.

JOE G. RILEY, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE